BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2019] NZEnvC 058

IN THE MATTER	of the Resource Management Act 1991 (the Act)
AND	of an application for enforcement order pursuant to s314 and application to discharge interim enforcement order pursuant to s320 of the Act
BETWEEN	ANDREW ALEXANDER MAEHL
	WINIFRED MARY CHARLESWORTH
	(ENV-2017-AKL-000065)
	Applicants for permanent orders
AND	JOHN ROBERT LENIHAN
	JANE HELEN GREENSMITH
	Applicants to discharge interim orders

Hearing:	18-19 March 2019
Judge:	J A Smith
Commissioner:	A C E Leijnen
Appearances:	Z A Matheson for A A Maehl and W M Charlesworth S Stienstra for J R Lenihan and J H Greensmith C J Brown for the Auckland Council (watching brief only, leave to abide decision of court and retire)
Date of Decision:	3 April 2019
Date of Issue:	- 3 APR 2019

DECISION OF THE ENVIRONMENT COURT

A: The court discharges the interim order from the 26 April 2019 and refuses the application for permanent order.

B: Application for costs is to be filed by 3 May 2019, any reply by 17 May 2019 and

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

any final reply, if any, by 24 May 2019.

REASONS

Introduction

[1] This is an application for a permanent order to replace an interim order made by the Environment Court on 29 May 2017 by Judge Kirkpatrick [2017] NZEnvC 078. This interim order was made when there were relevant proceedings before the High Court. The order was made under s314(1)(a)(i) and (ii) of the Act and it was made ex-parte. It was supported by a general undertaking as to damages signed by Mr Maehl.

[2] It is clear that the order was made in contemplation that an interim order made by the High Court protecting the tree may come to an end in the near future. This then refers the court to a decision of the High Court issued in August 2017. Although the decision itself is in relation to costs it traverses the circumstances and background of this matter in some detail.

[3] It appears an application was filed in late December 2015 and heard by the High Court between 31 October and 2 November 2016. It then appears there was an adjournment for further evidence with the matter set down for hearing of the immediate claim on 1 May 2017. The proceedings were rendered redundant by Lenihan and others on 28 April 2017 when the resource consent was surrendered.

[4] The application for ex-parte order before the Environment Court appears to have been to protect the Kauri subsequent upon the end of those proceedings. Nevertheless, in this hearing, the court heard that the actual interim injunction in the High Court was not withdrawn until sometime around February 2018, although we were not given precise details.

[5] Subsequent to the making of the ex-parte interim order by the Environment Court on 29 May 2017, the High Court issued a decision in respect of costs applications in August of that year.[1] That decision goes into some considerable detail as to the background of the proceeding and rejects applications by Lenihan and others for costs.

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[1] Lenihan et al v Maehl et all v AC & anor [2017] NZHC 1902 Whata J

For reasons that are not entirely clear it appears that the issue before this court was not addressed again prior to approximately May 2018.

[6] There is some difference as to whether the court raised the issue of the continuation of the order or whether this was raised by parties. Nevertheless, on 17 August 2018 an application was filed by Lenihan and others for the discharge of the interim enforcement order. An application for permanent enforcement order under s314 and 316 of the Act was filed by Maehl on or about 21 September 2018.

[7] The court then engaged in various minutes to bring this matter on for hearing including a number of requests for adjournment of the hearing date. The court has required this matter to go to hearing on either or both of the applications and the parties appeared and argued the matters fully before the court on 18-19 March.

The scope of this hearing

[8] Ms Matheson acknowledged at the commencement of her submissions for Maehl that if they could not sustain an application for a permanent enforcement order then the application for discharge of the interim order must succeed.

[9] In short, both parties agreed after some discussion with the court, that the two applications were the inverse of an application for enforcement order or the removal of orders in respect of the property. It was acknowledged by Ms Matheson that in terms of the now operative Auckland Unitary Plan, the removal of this Kauri (and any other on the property) was permissible.

[10] For reasons we will go into shortly, we have concluded that the plan is very clear that the removal of such trees is a permitted activity. This of course in terms of s314(1)(a)(ii) is not an entire answer to the issue given that there remains jurisdiction for the court to intercede in appropriate cases not withstanding that the activity may hold a consent or otherwise be permitted. Those constraints are a matter of some particular moment in this case as we will identify in due course.

Kauri protection and conservation

[11] The Environment Court has taken a particular interest in the maintenance of Kauri trees as a consequence of the invasive pathogen (phytophthora agathidicida) commonly

referred to as **Kauri Dieback**. Where such trees are protected and where there is the potential for them to be protected from Kauri dieback or other adverse effects, this court has been anxious to ensure that this charismatic megafauna (some might say iconic as the oldest living tree in New Zealand) is protected into the future.

[12] Nevertheless, as will be clear in this case, we are bound by the laws which are passed by parliament which saw an amendment to the RMA s76(4A) and (4B) which removed the ability for a council to have general blanket protection of trees within urban areas and instead required that particular and specific protections be put in place in a District Plan.

[13] Furthermore, even if such protections are in place, these do not displace the ability to obtain a resource consent to remove such trees in appropriate circumstances. As we will discuss, in fact such a permission did exist in respect of this tree at the time the tree was ringbarked in 2015 and which is discussed by the High Court in its decision as to costs.

[14] Accordingly, we wish to state at the outset that the outcome of this decision, for the detailed reasons that we give, is that there is no protection for this Kauri tree because it is not within a Significant Ecological Area (SEA) nor is it individually identified for protection under the Unitary Plan. That outcome may be extremely disappointing to many citizens. However, the remedy is either a plan change in accordance with the legislation or amendment to the RMA itself.

[15] Although this seems an extreme outcome, we hasten to add that much of the Titirangi, Waitakere area is protected by SEAs and also by a strong local culture for the preservation of such trees wherever possible. We note that many of the owners of such properties go to significant lengths to protect the trees on their property and they are actively involved in steps to address Kauri dieback and other potential causes of loss of this important species.

[16] To understand the court's conclusion in this matter, it is important to start with the statutory basis on which the Auckland Unitary Plan must be prepared. For reasons we will go into in some particular detail, the Waitakere Ranges Protection Act has little impact in this case and cannot override the terms of the Resource Management Act because of the provisions of s9 of the Waitakere Ranges Act which provide that the Resource Management Act will have priority.

The statutory position

[17] After the Resource Management Simplifying and Streamlining Amendment Act 2009 the Act was subsequently amended in 2013 by the insertion of the current provisions s76 (4A) to (4D) inclusive. These provisions removed any blanket protection for trees in urban areas, but allowed the control of felling, trimming, damaging or removal of a tree on a single urban environment allotment in very limited circumstances.

[18] Sub-section 4A required that a rule in a District Plan may prohibit or restrict the felling, trimming, damaging or removal of a tree or trees on a single urban environment allotment **only if**, in a schedule to the plan:

(a) The tree or trees are described; and

(b) The allotment is specifically identified by street address or legal description of the land or both.

[19] Sub-section 4B constitutes a similar provision in respect of a group of two or more trees over adjacent lots. This applies only within an urban environment and there is no argument in this case that the lots involved are smaller than 4,000m², that they are connected to reticulated water and waste, that they are not being used for industrial or commercial purposes and they are not a reserve. Sub-section 4D goes further to state to avoid doubt sub-sections 4A and 4B apply:

(a) Regardless of whether the tree, trees or group of trees is, or the allotment or allotments are, also identified on a map in the plan; and

(b) Regardless of whether the allotment or allotments are also clad with bush or other vegetation.

[20] Whatever may have been the intention of this legislation, its effect in respect of the Waitakere area is that many mature trees, Puriri, Rimu and Kauri in particular, some of which are of considerable antiquity, but on urban allotments are not identified, or covered by any group of trees provision, such as an SEA.

[21] In this case, the subject allotment in its entirety was originally an SEA in the notified proposed Auckland Unitary Plan. However, as a result of changes made

subsequent to the obtaining of a resource consent for the building of a house and clearance of vegetation, the Auckland Unitary Plan (AUP), was amended by consent, through its hearing phase, to provide for part of the allotment to have no SEA over it. The area of SEA removed was consistent with that enabled by the resource consent for a building. An extract of the SEA overlay map is annexed hereto and marked **A**. This means that the property in question includes at least this Kauri (and other trees) which have no protection and can be removed subject to rules in Chapter E of the AUP which we now more fully explain.

The Auckland Unitary Plan

[22] The AUP must comply with the statutory requirement under s76 and accordingly cannot control the removal of trees within the urban area unless it is justified under one of the exceptions. Under the AUP this has been addressed in two ways:

(a) One is that notable trees can be listed and identified individually within the plan (e.g. Schedule 10 Notable trees Schedule). We understand that few trees within the Waitakere area are identified in this way;

(b) The trees can be identified as part of a group of trees. The council has utilised the SEA process to identify large tracts of land within the urban area of the Waitakeres in this way (e.g. Schedule 3 Significant Ecological Areas – Terrestrial). These trees or SEAs are identified on the planning maps which form part of the AUP.

[23] Originally all of this site was identified in the notified plan as SEA but this was modified so that the portion closest to the road could accomodate a building platform within it which included a number of trees which would need to be removed. The balance of the site is still protected by SEA and this is shown clearly on the annexed Plan **A**.

[24] To understand the position of the relevant Kauri tree and the original proposal made for its removal we attach herewith as **B** a copy of a plan showing the position of the various trees and the intended position of the original consented house. That consent has been surrendered but served to illustrate the reason behind the SEA cut out and shows the approximate position of the trees including the subject tree on the site. Ms Matheson accepted that given the relevant parts of the AUP are now operative, the

removal of this area from the SEA is now moot and for all practical purposes there is no SEA control over the removal of trees on it.

[25] At the time it was also suggested that there was no particular control over trees so that removal was permitted by omission. The court has investigated this matter. We are satisfied that the plan is clear on the following points:

(a) That this site is within the Rural Urban Boundary (it is within an urban area);

(b) That it is zoned as Residential Large Lot but is not larger than 4,000m².

(c) There are several controls including macroinvertebrate community Index: Native and Stormwater Management Control Area over this site as a whole, but they are relevant for current purposes.

(d) That there are several mapped overlays including the Waitakere Ranges Heritage Area Overlay and the SEA overlay (T) which covers most of the site but excludes the pocket identified on the map **A** attached.

(e) That under Chapter E15 Vegetation Management and Biodiversity, there are Auckland wide rules relating to vegetation and biodiversity management. Where an activity is not covered by other zones A22A provides that vegetation, alteration or removals are permitted activities.

[26] Although there are standards in E15.6 which would make certain activities restricted discretionary activities, the only one applying on this site is E15.6.1 deadwood removal, which requires that all Kauri deadwood and material including sawdust and wood chips must be retained on site or disposed of to an approved landfill facility. Other standards identified in that section do not apply. Accordingly, there is a rule in the plan which permits the removal of this Kauri tree and others in a similar position, both on this land and other land, as of right.

Intervention by the court

[27] Both parties acknowledged that s314(1)(a)(ii) may permit, in appropriate circumstances, the court to make orders preventing an activity which may otherwise be

either permitted or subject to a resource consent granted. Although there are many cases in this area we consider that the most relevant for current purposes is *Save Our St Heliers Incorporated v Ancona Properties & Ors*[2]. In that case the buildings in question were not listed as heritage items in the plan although there appears to be a relatively high recognition of them as having some heritage value. The argument was that they did not need to be formally identified to warrant protection as historic heritage.

[28] An almost identical argument could be made in respect of this tree given that it is likely to be in the order of 150-300 years old, it is of a significant size being over 20m tall with a diameter of around one metre.

[29] Nevertheless, the combination of s319 and the terms of s314 are clear that there must be some threshold which the applicant must reach before the court will interfere in the otherwise lawful undertaking of activities which are either permitted or subject to resource consent.

[30] We have concluded in looking at these provisions that the degree of proof that would be necessary, (i.e. the threshold), involved would increase significantly where the activity is clearly a permitted activity and there is no argument as to misidentification or misapplication of the rule.

[31] In this case, this Kauri tree is in the position of many hundreds or thousands within the Waitakere area. There are a number of other Kauris of lesser age on this site and within the area which is not covered by an SEA. Clearly the historic heritage provisions of the Act would cover this tree, as it covers both natural and physical resources, but the question of its value is the issue in this case.

[32] We understand the law is clear that this cannot simply be an aversion by members of the public to the proper exercise of legal rights by owners. Many people may disagree with statutory amendment on this matter and the provisions of s76 4A-4D inclusive. The remedy in such a case is to seek to have the legislation changed. It cannot be that the court should be asked to achieve outcomes contrary to those in the statute because a significant proportion of the public does not agree with them.

[2] [2011] NZEnvC 1991

Culturally offensive or otherwise objectionable

[33] Ms Matheson advanced evidence from a number of witnesses, many of whom are senior well-respected members of both local iwi and the scientific community. It is clear that they hold Kauri generally in high regard and that they have significant concerns about the loss of a Kauri of this size and age.

[34] Furthermore, this tree has shown a remarkable ability to recover from being ringbarked in December 2015. In that case Mautauranga Maori procedures were utilised and a poultice of beeswax and Kawakawa leaves attached. Remarkably the tree has survived and, on our observation, appeared to be in at least as good a condition as other trees on this site and showed signs of recent resprouting in areas that had been bare.

[35] There is also no argument that the site as a whole is contaminated by PTA and that this and the other major Kauri trees on the road reserve appear to date to have resisted the disease. As Dr Waipara told us, there is developing science in this area which may show a convergence between Mautauranga Maori and scientific information particularly into the use of native trees including Kawakawa and other species in keeping PTA at abeyance or even destroying it. Dr Waipara was anxious to tell us that the ringbarking has a similar effect to the lesions which form from the PTA bacteria which generally is shown at a more advanced stage where the roots have been rotted by the disease.

[36] He is unable to comment at this stage as to why this tree has survived its contaminated site and the offence of the ringbarking but considers that the tree is very significant as a result. The iwi representative similarly see this as an example of the principles of Mautauranga Maori working but more broadly are very concerned at the continuing loss of Kauri to the disease. In a way they see this as a symbol of hope, even though they do not suggest that this particular tree had any singular cultural significance before the events leading to this case.

[37] There is a particular irony in Ms Matheson advising that the special significance of this tree relates to the fact that it was ringbarked (when there was a consent in place that it could be taken down and that it has survived the event). The particular affront to the community appears to relate to an undertaking that may have been given (to the newspaper or the members of the public), that the tree would not be removed.

Nevertheless, it is clear this undertaking was not given in a court context nor was there any evidence given to show that this was in any enforceable form whatsoever.

Conclusion as to significance

[38] There are a number of trees on this site and the nearby roadside which have survived notwithstanding PTA being confirmed on this site. This tree has further survived the affront of being ringbarked in December 2015. We cannot conclude that those events are of such significance that they would justify this court in interfering with the clear rights of the landowner to undertake a permitted activity on their property.

[39] Whilst we see that the consequences of the removal of large numbers of Kauri trees in the Waitakeres would be devastating, this is nevertheless permitted by the legislation which was introduced with the clear intent of allowing such activity. The remedy must be statutory given the clear intent of this section. We are unable to see that there is any particular cultural or other significance to this tree or this site sufficient to justify us interfering with this landowner's rights which have otherwise been exercised appropriately.

The previous consent

[40] Reinforcing us in this view is the detailed discussion by the High Court as to the granting of the consent for the removal of this tree when the tree was within an SEA and its removal required a resource consent. The High Court was satisfied that the council had properly considered the impact on the tree and all other matters in reaching its conclusion to grant consent.

[41] Although this was not determined for the purposes of the costs decision which was issued, it is compelling before this court. We are satisfied that the council weighed the impact of providing for a residence on this site by minimising the impact and shifting the building platform right onto the boundary with the road and utilising part of the road boundary for access and parking. In doing so this preserved the majority of the rear of the site which constitutes an important conservation area with interconnected ecological corridors through the valley floor from the sea inland.

[42] Given that the consent has now been surrendered, it is clear that any application to build on this site would require the applicant to comply with the standards within the

plan or seek resource consent. Ms Stienstra tells us that there is a 10m setback from the front boundary of this property for any building and a 6m setback from side boundaries. It is clear from the diagram we have attached as **B** that the subject Kauri tree is within 10m of the front boundary and may even be within 6m of the side boundary (although we are not clear on this). In practical terms therefore, it may not be necessary for the owner to remove the tree to construct a home. We appreciate that this simply means that the owner may not have to remove the tree to build a house but would still be entitled to do so as a permitted activity.

Comment

[43] We appreciate that this decision will be disappointing to the many people who have undertaken a special interest in this tree and the Kauri dieback issues which are arising in the Waitakere.

[44] One mechanism for protection which could be utilised is the identification of notable trees in the Schedule of the Plan. We understand that Maehl and others have sought to have this tree included but the council has to date not agreed to this request.

[45] Finally, we should say that the reliance on the Waitakere Ranges Heritage Act seems to us misplaced given s9 of the Act and that the provisions are largely taken into account under s10 and s11 in regional and district plans, resource consents and conditions.

[46] We note there is a provision relating to declarations. Overall it appears to us that the provisions of the Waitakere Ranges Heritage Area Act 2008 cannot override the clear provisions of the Resource Management Act given the terms of s9. On this basis the Waitakere Ranges Heritage Area Act 2008 cannot provide a basis for the issuing of any enforcement order under the Resource Management Act where that contradicts s76 4A-4D inclusive and the provisions of the AUP which provide for it as a permitted activity.

Continuation of interim order

[47] We appreciate that the outcome of this decision will create some concern and consternation in the local community. We have concluded that a short period should be allowed before the interim order expires in the event that the parties wish to seek further injunctions in the High Court. Given our conclusion in relation to this matter we cannot

see any basis upon which this court has the power extending the enforcement order beyond such a reasonable period. In the end we have concluded that the interim order should expire on 26 April 2019.

Outcome

(1) The court discharges the interim order as at **26 April 2019**.

(2) That the application for permanent enforcement order is refused.

(3) Any application for costs is to be filed by **3 May 2019**;

(4) Any reply by **17 May 2019**;

(5) Any final reply, if any, by **24 May 2019**.

Judge J A Smith
Environment Judge